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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 19

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| NEXSTAR BROADCASTING, INC. d/b/a KOIN-TV,<br><br>and<br><br>NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, LOCAL 51, AFL-CIO, | No. 19-CA-211026<br><br>**BRIEF TO THE ADMINISTRATIVE LAW JUDGE** |

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## I. INTRODUCTION

These matters are before the Honorable Eleanor J. Laws, Administrative Law Judge, on a Complaint alleging that Nexstar Broadcasting, Inc., d/b/a KOIN-TV (the Respondent) violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the Act) when it unlawfully refused to provide relevant information requested by the National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51 (the Union) in connection with issues that arose during bargaining related to the work performed by bargaining unit employees. Respondent's failure to provide the requested information affects the Union's ability to bargain, and administer and enforce the contract. As such, the requested information is presumptively relevant, and the Respondent's failure to provide it constitutes an unfair labor practice.

## II. STATEMENT OF THE CASE

The facts in this case are simple and undisputed, as set forth in the Joint Motion and Stipulation of Facts:

### A. Background

The Respondent operates a television station, KOIN-TV, in Portland, Oregon. (Stipulated Fact No. 5). The Union is the exclusive bargaining representative of the engineers, production employees, news and creative services employees, and web producers employed by the Respondent at KOIN-TV. (Stipulated Facts Nos. 13-16.)[1] The employees in the bargaining units represented by the Union include Graphic Artists, who are responsible for the creation of specialty on-air graphics, promotional material, video, and special web graphics on specialized equipment. (Stipulated Fact No. 17.)

[1] The Union was the exclusive bargaining representative of the same units employed by Media General KOIN-TV prior to January 2017. Respondent purchased the business of Media General KOIN-TV in January 2017, and has continued to operate the business in basically unchanged form, employing former employees of Media General KOIN-TV as a majority of its employees. (Stipulated Fact No. 6). As such, Respondent has stipulated that it is the successor to Media General KOIN-TV. (Stipulated Fact No. 7.)

The most recent collective bargaining agreement expired August 18, 2017. (Stipulated Fact No. 14.) During the course of bargaining for a successor agreement, the Union heard that Respondent had ended hubbing of graphics. At a bargaining session on June 21, 2017, the Union noted in a set of proposals passed to Respondent that it "need[ed] to understand the status of graphics at the station" as well as the "impact on recall rights and jurisdiction." (Stipulated Fact No. 19.) The Union's business representative asked when the graphics work would return to the station, and the Respondent agreed to research the Union's question and provide an answer. (*Id.*)

During the same bargaining session, the Respondent presented a proposal that would eliminate the "still store" from the list of equipment operated by Graphic Artists. (Stipulated Fact No. 20; Ex. H.)

**B. The Union requested information about the relocation of the Graphic Artists' work and the proposed elimination of the "still store" from Respondent's equipment**

On November 30, 2017, the Union made a formal information request. (Stipulated Fact 21; Ex. F.) The Union specifically asked for information about who was performing the bargaining unit work and when the work would return to Portland, stating:

> We heard that Nexstar has ended hubbing of graphics. … When we asked when the graphics work was coming back to the station we were told the station would check and get back to us.
> Please now consider this a formal information request in regard to the work of "creating specialty on-air graphics, promotional material, video, and special web graphics" at KOIN-TV. Where is the work being performed, and by whom? When did, or will the work return to Portland?

(Ex. F.) In its request, the Union also asked for information about the proposed elimination of the "still store" from the list of equipment to be operated by Graphic Artists. Specifically, the request stated:

> You have proposed to eliminate the "still store" from the list of equipment to be operated at KOIN-TV for the creation of news graphics, Creative Services and promotion graphics. Please provide a comprehensive list of the equipment currently used to perform this work.
> Please also separate the equipment by category, so that we may understand what language should replace the phrase "still store."

(*Id.*)

### C. The Respondent did not provide the requested information

The Respondent failed to provide the requested information. Instead, in its December 8, 2017 response to the Union's information request, Respondent simply stated that "the Station's current graphics needs have been supported through the Nexstar Nashville Design Center." (Ex. G.) No information was provided about who was actually performing the work, and the information did not disclose whether the work was being performed by supervisors or whether the Union could exercise recall rights for the Graphics Artist position. (*See id.*; *see also* Ex. E [CBA Article 14 Seniority and Seniority Rights, describing conditions for exercising recall rights].) Similarly, the Respondent did not say definitively whether all the work would be returning to Portland, and did not provide a timeline that would enable the Union to determine when the work would be returning to Portland. (*See id.*) Instead, the Respondent simply explained that a position had been posted for a Graphic Designer position in Portland. (*Id.*) There was no explanation of what this potential hire would mean for continued outsourcing of the work from the station in Portland. (*See id.*)

Similarly, the Respondent failed to provide the requested list of equipment it maintained for the creation of graphics. Instead, Respondent simply stated that the "still store" was replaced with "a contemporary, state of the art device" sometime "in 2009." (*Id.*)

Following the December 8, 2017 response, no further information was provided by the Respondent. (Stipulated Fact No. 23.) The amended charge in this case was filed on December 21, 2017. (Stipulated Fact Nos. 1 and 2.) Three months later, on March 23, 2018, the parties reached a tentative agreement on the Respondent's proposal to eliminate the "still store" from the list of equipment operated by Graphics Artists. (Stipulated Fact No. 24; Ex. H [eliminating the "still store," but adding in "computer software" and "associated equipment"].)

The Union and Respondent are still engaged in successor bargaining. (Stipulated Fact No. 24.)

## III. LEGAL ANALYSIS

### A. The information requested by the Union is presumptively relevant, and Respondent violated the Act by refusing to provide the Union with such information

Under Section 8(a)(5) of the Act, an employer is required to provide the union with relevant information needed to enable it to properly perform its duties as the employees' bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (holding that an employer had a duty to provide information relevant to bargainable issues upon requests from the union)).

Information that implicates terms and conditions of employment of bargaining unit employees is presumptively relevant, and the employer must provide the information. *CalMat Co.*, 331 NLRB 1084 (2000); *Disneyland Park*, 350 NLRB 1256, 1257 (2007) (information pertaining to employees within the bargaining unit is presumptively relevant).

Even where information is not presumptively relevant, a union satisfies its burden to demonstrate relevance when it demonstrates a reasonable belief that the information requested is relevant. *Disneyland Park*, 350 NLRB at 1257. Proving relevance is as easy as the requesting union indicating the reason for its request. *Paccar, Inc.*, 357 NLRB 47, 49 (2011). Thus, the burden to establish relevance is not an exceptionally difficult one, and requires only that the desired information be useful to the union in carrying out its statutory duties and responsibilities. *Castle Hill Healthcare Center*, 355 NLRB1156, 1179 (2010); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). The requested information need not be dispositive of the issue for which it is sought but need only have some bearing on it. *Pennsylvania Power & Light*, 301 NLRB 1104, 1105 (1991). An employer "must furnish information that is of even probable or potential relevance to the union's statutory duties." *Confrock Co.*, 263 NLRB 1293, 1294 (1982).

The information requested about the relocation of bargaining unit work and the equipment maintained by the Respondent for the creation of graphics directly implicates the terms and conditions of employment of bargaining unit employees. As such, it is presumptively relevant. *CalMat Co.*, 331 NLRB 1084 (2000); *Boeing Co.*, 363 NLRB No. 63 (2015) (adopting

ALJ's decision that the union's requests for information relating to specific plans for relocation or realignment of work performed by unit employees to other areas of the country was presumptively relevant). Moreover, it is clear that such information could potentially be relevant to the Union's ability carrying out its statutory duties. The requested information about the identities of the workers performing the bargaining unit work and information about if and when all the bargaining unit work would be returned to Portland was necessary for the Union to determine if bargaining unit work was being done by supervisors and to determine if and when the Union could exercise recall rights for the Graphic Artist position. (*See* Stipulated Fact 19(a) [Union's disclosure that it "need[ed] to understand the status of graphics at the station" and the "impact on recall rights and jurisdiction"].) The requested list of equipment used for the creation of news graphics was necessary for the Union to evaluate the Respondent's proposal to eliminate the "still store" from the list of equipment operated by Graphic Artists in the CBA, and, as the Union pointed out, providing information about the category each piece of equipment fell into was necessary so that the Union could "understand what language should replace the phrase 'still store.'" (Ex. F.) This requested and withheld information was clearly relevant to the Union's ability to bargain, administer the contract, and enforce its employees' contractual rights.

Once the union has proven the information it requested is relevant to its statutory obligations of performing its duties as the bargaining unit representative, "the employer has the burden to prove a lack of relevance . . . or to provide adequate reasons as to why he cannot, in good faith, supply such information." *CalMat Co.*, 331 NLRB 1084, 1095 (2000) (quoting *San Diego Newspaper Guild Local 95* v. NLRB, 548 F.2d 863, 867 (9th Cir. 1977)). The Respondent has not proven a lack of relevance for the requested information, and the record does not reveal any reasons why it could not, in good faith, supply such information.

**B. The March 23, 2018 tentative agreement is not a defense**

The Respondent attempts to assert that the information sought is "no longer relevant" because a tentative agreement was reached concerning the elimination of "still stores" from the list of equipment operated by Graphic Artists in the CBA. (Joint Motion and Stipulation of

Facts, p. 9.) The fact that a tentative agreement was reached months after the Respondent unlawfully withheld relevant information cannot shield Respondent from a finding of an unfair practice. "[A] union's 'proffered reasons for demanding the information, as well as the employer's motives for refusing that demand, must be examined as of the time of the demand and the refusal." *Kraft Foods N. Am., Inc.*, 355 NLRB 753, 755 (2010) (citing *General Electric Co. v. NLRB*, 916 F.2d 1163, 1169 (7th Cir. 1998) (rejecting the notion that the relevance inquiry allows the Board to "consider the state of affairs by the time of the hearing"); *New York Printing Pressmen and Offset Workers Union v. NLRB*, 538 F.2d 496, 501 (2d Cir. 1976) (Board must examine reasons provided by employer at time it denied union's request for information, not explanation raised at hearing before the ALJ); *Burner Sys. Int'l, Inc.*, 273 NLRB 954, 960-62 (1984) (in defending unfair labor practice charge, employer may not justify conduct by relying on facts arising after the employer's action or on facts unknown to employer at time it acted); *NLRB v. A.S. Abell Co.*, 624 F.2d 506, 513 n. 5 (4th Cir. 1980) ("We deal with the fact situation presented to the Company at the time it acted.").

Moreover, the agreement as to eliminating the still store from the list of equipment operated by Graphic Artists is explicitly "tentative," and bargaining is still ongoing. (Stipulated Fact 24.) In such circumstances, the Union could withdraw its proposal for good cause, like new information that was previously unlawfully withheld. Robert Gorman and Matthew Finkin, LABOR LAW ANALYSIS AND ADVOCACY (2013), pp. 644, 646 (withdrawal of a previously agreed upon proposal permissible for good cause, and express agreement "that the proposals put on the table … [are] merely 'tentative' or 'nonbinding' until an entire agreement is negotiated" make it more likely that a party's withdrawal of a proposal will be found permissible (citing *Reliable Tool & Mach. Co.*, 268 NLRB 101 (1983))). Consequently, the requested list of all equipment used for the creation of graphics and the category of each piece of equipment is still relevant.

Additionally, the tentative agreement with respect to the "still store" does not affect the relevance of information about who is performing bargaining unit work and whether and when the work will be moved back to Portland is relevant to the current bargaining even with the

tentative agreement with respect to the still store. Such information is still relevant to the Union's ability to bargain, in bargaining efforts that are ongoing. (Stipulated Fact No. 24.) Even outside of bargaining, such information is directly relevant to the Union's ability to perform its function as the bargaining unit's representative and administer and enforce contractual rights regarding bargaining unit work and recall rights.

## IV. REMEDIES

The Union seeks a recommended order requiring Respondent to cease and desist from its unlawful conduct and provide the requested information. The remedy should also include the following:

Respondent should be required to post permanently the Board's ill-fated employee rights notice. https://www.nlrb.gov/poster. The Courts that invalidated the rule noted that such a notice could be part of a remedy for specific unfair labor practices. It is time for the Board to impose the requirement for a lengthy posting of that notice as a remedy for unfair labor practices.

Additionally, any notice that is posted should be posted for the period of time from when the violation began until the notice is posted. The short period of sixty (60) days only encourages employers to delay proceedings, because the notice posting will be so short and so far in the future.

The Notice should be included with any payroll statements. *See* Cal. Lab. Code § 226.

The Board's Notice and the Decision of the Board should be mailed to all employees. Simply posting the notice without further explanation of what occurred in the proceedings is not adequate notice for employees. The Board Decision should be mailed to former employees and provided to current employees.

Notice reading should be required in this matter. That Notice reading should require that a Board Agent read the Notice and allow employees to inquire as to the scope of the remedy and the effect of the remedy. Simply reading a Notice without explanation is inadequate. Behaviorists have noted that, "[t]aken by itself, face-to-face communication has a greater impact than any other single medium." Research suggests that this opportunity for face-to-face, two-

way communication is vital to effective transmission of the intended message, as it "clarifies ambiguities, and increases the probability that the sender and the receiver are connecting appropriately." Accordingly, a case study of over five hundred NLRB cases, commissioned by the Chairman in 1966, strongly advocated for the adoption of such a remedy, recommending "providing an opportunity on company time and property for a Board Agent to read the Board Notice to all employees and to answer their questions." The employer should not be present. The Union should be notified and allowed to be present. This should be on work time and paid. If the employees are working piece rate, the rate of pay should be equal to their highest rate of pay to avoid any disincentive to attend the reading.

The traditional notice is also inadequate. The standard Board notice should contain an affirmative statement of the unlawful conduct. We suggest the following:

> We have been found to have violated the National Labor Relations Act. We illegally refused to turn over information that was relevant to bargaining and necessary to the Union's ability to perform its duties as the bargaining representative. We apologize. We have now been ordered to turn over all such requested information. We ask your forgiveness for violating the National Labor Relations Act.

Absent some affirmative statement of the unlawful conduct, the employees will not understand the arcane language of the notice. Nor is the notice sufficient without such an admission. In effect, the way the notice is framed is the equivalent of a statement that the employer will not do specified conduct, not an admission or recognition that it did anything wrong to begin with.

The Notice should be incorporated on any company screensavers or opening windows or screens for all computers for the length of the posting period.

The Notice should require that the person signing the notice have his or her name on the notice. This avoids the common practice where someone scrawls a name to avoid being identified with the notice, and the employees have no idea who signed it.

The employees should be allowed work time to read the Board's Decision and Notice. To require that they read the Notice, whether by email, on the wall or at home, on their own time is to punish them for their employer's misdeeds.

The Notice should be read to employees by a Board agent outside the presence of management. Representatives of the Charging Party should be present. Employees should be allowed to ask questions.

## V. CONCLUSION

The undisputed facts establish that Respondent has refused to provide the requested information in violation of § 8(a)(5) of the Act. The Administrative Law Judge should order the remedies sought by the Union.

Dated: September 13, 2018

WEINBERG, ROGER & ROSENFELD
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**PROOF OF SERVICE**
**(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On September 14, 2018, I served the following documents in the manner described below:

**BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☑ (BY FACSIMILE) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.

☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from mpiro@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 14, 2018, at Alameda, California.

Mary Piro